

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Corrected

75-1235 ⁶ *Pgs.*

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT J. ENRIGHT,

Appellant.

Docket No. 75-1235

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Whether there are any non-frivolous issues to be raised for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles M. Metzner) entered on March 26, 1975, convicting appellant Robert J. Enright of bank robbery while armed (18 U.S.C. §2113(e)), and sentencing him to a term of twenty years' imprisonment. The period of custody was made to run concurrently with a State term of imprisonment for the length of the State sentence, the remainder of the term to be served in a Federal institution.

Retained counsel was relieved, and this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was indicted for bank robbery and bank robbery while armed.* The charges arose from the theft of money on July 19, 1973, from a branch of the National Bank of Westchester in Mount Vernon, New York.

Customers and employees of the bank testified to the appearance at the bank of a man who was at least six feet tall,

*The indictment is "B" to appellant's separate appendix.

was well built,* or at least "not thin," and had blond hair** (54-55, 72, 77, 89, 105***). He wore a mask (52, 71, 89, 104) and a white hat with a colored or striped band (71, 89, 104, 105). The man carried a black handgun with a long barrel (53, 82)**** and a white towel or cloth (53). One witness recalled that he wore surgical gloves (89).

The man jumped over the teller's desk (53, 86, 104). He returned by the same route, hitting himself against a wall and falling down. As he fell, he dropped the money he had put into his pockets onto the floor (53, 71, 86, 104).***** The robber then left the bank and entered, on the driver's

*One witness compared appellant with the robber as to size and weight. After this testimony, the Judge instructed:

You may sit down, Mr. Enright. The jury understands that this witness did not see the face of the person who robbed the bank. She is merely describing his physical appearance, the way he physically looked to her at the time. She is not saying that this person on trial here was the person who robbed the bank. She does not know. She can only describe what she saw. Go ahead.

(106).

**One witness said his hair was "dirty or dark brown" (89). Another said it was dark (105).

***Numerals in parentheses refer to pages of the trial transcript.

****One witness with a "little familiarity with guns" identified the weapon as a .38 magnum (91).

*****About \$685 was found on the floor of the bank, and an audit of the bank revealed a shortage of funds in the amount of \$3,512.

side, an unoccupied (67) blue car (68, 79, 84, 88, 105), the license number of which several witnesses gave to agents but could not recall at trial (54).

Carol Hanchard, who lived near the bank, testified that on July 19, 1973, as she was returning home from school, she saw a car parked in front of her home (120). She looked at the man sitting in the car as she crossed the street to approach her home because she thought he was the previous owner of the house. She then realized this was not the man (137). She proceeded past the driver's side of the car and crossed in front of the vehicle. As she drew near the car, she saw the man pull down over his head a white hat with a red and blue striped band (121) and slouch down in the car (156).

Next to the man on the seat of the car was a transparent mask with human features. The man moved the mask to cover a gun also lying on the car seat (121). Ms. Hanchard stopped when she saw the mask and looked at the man "a little way from him" (136). She also observed the man several times from the window of her house as he sat parked in the car (156). She identified appellant Enright as the man in the car (123-124), and testified that she had identified him previously in a lineup.*

*Prior to trial there was a motion to suppress Ms. Hanchard's testimony. In the course of the proceeding, the Judge stated that defense counsel should limit his questioning to the conduct of the lineup, and only if the lineup was found to be suggestive should he proceed to the relevant prior circumstances (5-6). However, questioning did cover

FBI Agent George Wisnovsky testified that, based on descriptions given by witnesses (161-162), a blue 1971 Buick with license number BQ5850 was found on the day of the robbery (163-164) six or eight blocks from the bank (161). The car had been stolen on or about July 1, 1973 (179). In the car were an empty half-pint Gordon's gin bottle, a white hat, and a white handkerchief. Appellant's thumbprint was found on the gin bottle (186, 188-189).^{*} The car had previously been stolen in April 1973 (179), and found and returned by police a week later (180). The car had been used in the commission of a crime.

Through the testimony of Agent Wisnovsky on cross-examination, it was revealed that a Leo Dortort had seen

the prior photographic spreads. There were three photographic spreads. The last, held on February 28, 1974 (12-13), contained the profile half of a mug shot of appellant (Defense Exhibit A at trial) (14). Ms. Hanchard made no selection of any photograph as being one of the man she saw (11, 75). The testimony was that the lineup was set up with the knowledge of appellant's assigned attorney (7), who also made suggestions as to appellant's place in the line and to the removal of neckties by participants in the lineup (34); and that the participants in the lineup were FBI agents chosen because they matched the description the Government had of the bank robber (8).

Ms. Hanchard viewed the lineup from a distance, and then moved closer (25).

Judge Metzner refused to permit defense counsel to call Ms. Hanchard (39-40) as a witness during the suppression proceedings, and denied the motion to suppress (40-41).

At trial, Ms. Hanchard testified that she was shown more than three spreads (143), that some of the photographs might have been repeaters (143), and that she could make no identification of anyone from the photographs. She was shown the photographs at trial and could not identify the one of appellant (144).

^{*}During the course of Agent Wisnovsky's testimony, he revealed under questioning by the Assistant U.S. Attorney that that he contacted appellant at the Ossining Correctional Facility and there took appellant's fingerprints (165). However, no objection or motion for mistrial was made after the reference to the State prison.

someone leaving the car (166). The prosecution interviewed Mr. Dortort (166), but he could not be located by the Government at trial, although he was subpoenaed and a warrant had been issued for his arrest. The District Judge would not permit defense counsel to elicit from Wisnovsky the description Dortort had given of the man leaving the car, on the ground that such testimony was hearsay (168-169). In any event, Agent Wisnovsky testified that not he, but an Agent D'Main, had taken the interview with Dortort and had prepared the FBI report (171).

Ralph Staiger testified for the Government. He revealed his extensive criminal record and the pendency of six indictments in the Eastern District of New York charging bank robbery, and three in the Southern District of New York involving bank robbery (217).^{*} Staiger revealed the extent of the bargain which had been offered to him for his cooperation with the Government:

... The agreement that was reached was that if I were to testify truthfully before grand juries and at trials I would be allowed to plead guilty to three of the six bank robberies in the Eastern District and one or more counts of conspiracy in the Southern District.

... The state charge of bank robbery would be dropped if I am sentenced in the federal court to the similar charge.

^{*}An indictment charging bank robbery was also pending in Suffolk County, but was premised on the same crime as one of the Eastern District indictments.

... My wife is indicted with me in the Suffolk state charge and the federal charge stems from the same bank in the Eastern District, the same as the Suffolk charge. It is my understanding that if she pleads guilty to the charge of conspiracy, be allowed to plead guilty to the charge of conspiracy if they [sic] testified truthfully before grand juries and trials in relation to the charges, bank robbery charges.

... [I]n the federal jurisdiction the sentencing is left entirely up to the judge. The court will be apprised of the nature of my cooperation in these charges.

... I am not sure if I have been declared in violation of [State parole] or not yet, but I will, upon pleading guilty to any charges, definitely be charged for parole violation and I will owe the three years, if that is not my status already. It is my understanding that the government will not ask for any reduction of the time. There was an inquiry made about the possibilities of me serving the parole time at the same time as the terms that I receive for the federal bank robbery charges.

(218-220).

Staiger testified that he had known appellant Enright for twelve or thirteen years. In March 1973, Staiger and appellant looked at banks they might possibly rob. They looked at a Mount Vernon bank, and Staiger did not like it because there was too much glass in the building (202). The two men spoke again in June or July 1973 about robbing a bank (202). At that time, Staiger lent appellant money (200-201). Appellant told Staiger that appellant had mailed a gun from California (203). Appellant went to the Post Office and returned with a package containing a .38 caliber

Smith and Wesson with a long barrel, loaded with three shells (204).

Staiger then testified that he and Enright discussed a Monday morning robbery of a New Rochelle bank to be carried out by appellant alone (205) for a fee of \$20,000 (204). Staiger and appellant looked at the bank and a "layover apartment," and Staiger told appellant "we" will supply the stolen automobiles for the robbery (205). The stolen cars, one of them a 1971 or 1972 Buick LeSabre,* were then turned over to appellant (206).

On two occasions the planned robberies did not take place, the later one because the police had recovered one of the stolen cars (207).

Staiger testified that appellant then talked to him about the Mount Vernon bank he and Staiger had discussed earlier that March (208).

The two men met periodically, at which times Staiger lent appellant money (209). In mid-July, Mrs. Staiger was to meet appellant to give him some money. Appellant refused to accept the money, however, and went with Mrs. Staiger to meet her husband. Appellant gave Staiger \$400 or \$500, saying, "I grabbed that bank," and advising Staiger to buy a Westchester newspaper the following day (210).

*This stolen car was used by Staiger and others in an earlier robbery (214). See infra at 5.

According to Staiger, at this meeting appellant was carrying the same gun he had earlier received in the mail (211) and picked up at the Post Office.

In a later conversation appellant told Staiger that he had dropped some of the money in the bank (212).*

Staiger identified the mask the bank robber wore as one he had given appellant for use in the planned New Rochelle robbery which had not taken place. He also identified the hat as one appellant had had with him (213).

Staiger testified that appellant committed seven other armed robberies between September 1973 and March 1974 (215). These involved use of disguises, including hats and masks, and of stolen cars (216).

Prior to Mr. Staiger's testimony, defense counsel sought to preclude any evidence from him as to prior similar acts by appellant (197). Memoranda prepared by both sides concerning this issue were filed with the District Court prior to trial.

*Mrs. Staiger testified that appellant had said he was sorry he was in the bank alone because he had forgotten the bag, that he had stuffed money in his pockets, and that the money had dropped out (260).

According to Mrs. Staiger, in another conversation appellant showed her the "frozen face" mask he had used in the robbery (260).

Mrs. Staiger also revealed that she was under indictment for robbery in the United States District Court for the Eastern District of New York and in Suffolk County, and that she had been told that if she testified truthfully she would be permitted to plead guilty to conspiracy in the Eastern District and that the Suffolk County charges would be dismissed after the Federal sentence was imposed (262).

The District Judge denied the motion to preclude testimony of prior similar acts committed by appellant (198).

The defense witnesses testified concerning the lineup and identification procedures.

After deliberations, the jury returned with a verdict convicting appellant of the crimes charged.

STATEMENT OF POSSIBLE LEGAL ISSUES

1. Similar Acts

Mr. Staiger testified to bank robberies in which appellant participated subsequent to the July 19, 1973, robbery. However, Staiger explained that in these robberies too masks, including ones like the frozen face mask used in the crime charged here, floppy hats, stolen cars, and guns were used. Thus, testimony concerning these acts was relevant to show modus operandi. United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Cifarelli, 401 F.2d 512, 513 (2d Cir.), cert. denied, 393 U.S. 987 (1968); United States v. Deaton, 381 F.2d 114 (2d Cir. 1967).

Although the District Court did not instruct the jury on the limited use of such evidence, counsel made no request for such a charge. United States v. Papadakis, supra, 510 F.2d 295; United States v. Cifarelli, supra, 401 F.2d 512.

2. Limitation of Examination on the Validity
of the Identification Procedures

At the pretrial hearing on the motion to suppress, defense counsel sought to inquire as to the procedures involved in the use of photographic spreads. The District Judge sustained an objection by the Government to this line of inquiry, holding that counsel first had to show that the lineup was unfair. Counsel also asked that the defense be permitted to call Ms. Hanchard as a witness at the hearing. The Judge refused to permit counsel to do so, and counsel objected. While appellant disputes the correctness of these rulings,* the record shows that counsel did inquire about the photographs and used them at both the hearing and the trial. According to the FBI Agents, appellant's photograph, the profile half of a mug shot, was used in only the third (and final) spread. At trial, Ms. Hanchard testified that she saw several spreads and thought some of the photographs might have appeared in more than one spread. However, she made no identification, and could not select the photograph of appellant in the courtroom even though she sat facing him.

*If the pretrial photographic spreads were suggestive, for example, the repeated use of appellant's photograph, no matter how fair the composition of the lineup, the process would be suggestive and it would be necessary to review the circumstances of the witnesses' identification to determine whether the witnesses had an independent basis for their identification.

Thus, although the rulings of the District Judge in the pretrial proceedings were erroneous, in effect they were not adhered to and the identification testimony was proper.

3. Reference to Appellant's Present

Incarceration

In Agent Wisnovsky's testimony the agent made reference to appellant's then current custody in a State correctional facility. However, there was no objection, nor was there a motion for mistrial.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues in this case which might be raised for this Court's review. Accordingly, an order should be entered relieving The Legal Aid Society, Federal Defender Services Unit, as counsel for Mr. Enright on this appeal.

Respectfully submitted,

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September 12, 1975

Certificate of Service

September 16, 1975

Corrected

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to appellant.

Elmer H. Hanger

in 9/16/75 corrected brief will be filed as of 9/1/75